In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-529

JACK P. F. GREMILLION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on five counts of giving perjured testimony before a grand jury in violation of 18 U.S.C. 1621 and was sentenced to imprisonment for concurrent three year terms. The court of appeals affirmed. 464 F. 2d 901 (Pet. App. 1).

The evidence showed that on January 21, 1969, petitioner, then Attorney General of the State of Louisiana, testified before a grand jury investigating the operations of a bankrupt loan company, The Louisi-

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ana Loan and Thrift Corporation ("LL&T") (R. 68–69).[1] In the course of his testimony petitioner denied that he had any economic interest in LL&T, and these various denials formed the basis for the five perjury counts.[2]

There was sufficient evidence to show that the denials were false: in particular, that petitioner owned 10,000 shares of stock in LL&T, had signed a proxy reflecting ownership of at least 2,000 shares of voting stock, and had received dividends. (R. 88, 94–95, 146–147, 157–159, 189–190, 199, 579, 683, 847; Exh. 12, 13, 15, 16). There was also evidence of attempts to conceal his interest (R. 171–175, 187).

1. Petitioner challenges the admissibility of two documents: a work sheet prepared by clerical employees in the course of determining the persons eligible to receive LL&T dividend checks, and a letter to the Louisiana Banking Comissioner, which was intended to serve as the "opinion of counsel" required

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[1] "R." refers to volumes 2 and 3 of the three-volume record. We are lodging the record with the Clerk of this Court.

[2] Petitioner stated, "I do not nor have I ever owned stock in LL&T, even though I was asked to do so" (count 1). He also denied having any "economic interest" in LL&T (count 2), or ever executing a proxy reflecting shares of stock which he held (count 3). Petitioner further testified that a minute entry, showing that he was represented at a shareholders' meeting by a proxy, was false (count 4), and that a dividend check issued by LL&T made payable to one William Glennon, and endorsed by Glennon to petitioner who thereafter deposited it, was a campaign contribution (count 5) (Pet App. 32, n.1).

as part of an application to the State Securities Commission.[3]

a. The work sheet was admitted as a record made in the regular course of business. Mrs. Degan, the sole office employee of LL&T (R. 130), stated that the worksheet was prepared from information from other business records, and that she had personally prepared the last two pages. She further stated that she relied upon it to determine the names of shareholders entitled to receive dividend checks (R. 181–183). The work sheet was clearly admissible under the Federal Business Records Act, 28 U.S.C. 1732, as a record made in the course of "systematic conduct of the enterprise." *Palmer* v. *Hoffman,* 318 U.S. 109, 114. The claim that the secretary who prepared most of the document should have been called to testify was properly rejected at trial as not pertaining to the threshold question of admissibility (R. 183). Indeed, the federal statute was intended to eliminate the need to call the entrant of the business record as a precondition to admissibility. *Palmer* v. *Hoffman, supra,* 318 U.S. at 112–113, n. 3; *United States* v. *Teague,* 445 F. 2d 114, 119 (C.A. 7). The additional claims on appeal, addressed to the authenticity of the work sheets and the denial of the Sixth Amendment right to confront one's accusers, are equally without substance. The

[3] Both documents are irrelevant to some of the counts upon which petitioner was convicted (*e.g.*, counts 3 and 4, involving petitioner's execution of a proxy). In this circumstance, and in light of the imposition of equal concurrent sentences, this Court need not consider the challenges. Cf. *Benton* v. *Maryland,* 395 U.S. 784.

former contention ignores the trial record; the latter is contrary to settled law. See *United States* v. *Kelly*, 349 F. 2d 720, 770 (C.A. 2), certiorari denied, 384 U.S. 947; *McDaniel* v. *United States*, 343 F. 2d 785 (C.A. 5), certiorari denied, 382 U.S. 826; *Kay* v. *United States*, 255 F. 2d 476 (C.A. 4), certiorari denied, 358 U.S. 825; see also *Dutton* v. *Evans*, 400 U.S. 74.

b. The opinion letter was admitted following testimony by its signator that it was composed through the joint efforts of individuals gathered in petitioner's office, including petitioner (R. 591–596). The letter was relevant in showing that petitioner had an economic interest in LL&T, and was actively participating in measures designed to benefit the economic position of that company. In any event, in view of the other abundant evidence supporting the government's position, the letter could hardly have furnished the basis for conviction on any count. Accordingly, petitioner's contentions regarding it do not warrant further review.

2. In his opening remarks, government counsel referred to a loan of $42,700 obtained by petitioner from LL&T. Defense counsel's objection on the ground that the matter of loans was irrelevant was overruled by the trial judge, who indicated that he would rule on the relevance when the evidence was offered. The loan was not mentioned during trial. In his closing charge the court told the jury that statements and arguments of counsel were not evidence, and that they were to consider only the admissible evidence (R.

961–962). Moreover, the court defined "economic interest" as contemplating ownership of a business, or the right to participate in the profits or other financial benefits of the business (R. 968–969). In these circumstances, even if the prosecutor's opening reference to a loan was error, the court below properly ruled that it did not affect petitioner's substantial rights. See *United States* v. *Ramirez*, 367 F. 2d 813 (C.A. 7), certiorari denied, 385 U.S. 988; *Cook* v. *United States*, 354 F. 2d 529 (C.A. 9).

3. The grand jury before which the false testimony was given returned a separate sixteen-count indictment charging petitioner and several others with various mail fraud, conspiracy, and securities violations. The indictment alleged that the criminal conduct had continued to February 14, 1969, the date the indictment was filed. Following the subsequent return of the perjury indictment, petitioner moved to consolidate the charges; the motion was denied. Petitioner was acquitted on each of the sixteen charges under the first indictment, and claims that this acquittal barred the government from prosecuting the perjury charge. But despite petitioner's contention, the issues presented in the perjury case were not matters which were disposed of by the previous judgment. As the court of appeals noted, there were innumerable issues upon which the jury in the prior trial could have based its acquittal, and the ultimate fact questions involved in the perjury case were at most only tangentially related to the issues in the securities and mail fraud trial (Pet. App. 37). Therefore, under the

standard established in *Ashe* v. *Swenson*, 397 U.S. 436, 444, the court below correctly concluded that the perjury prosecution was not barred by the prior acquittal.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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[4] Petitioner's reliance upon *Petite* v. *United States*, 361 U.S. 529, is misplaced. That case involved an Executive policy against making several offenses arising out of the same transaction the subject of multiple prosecutions. The perjury charge and the prior charge in this case did not arise from a single transaction; nor would the exercise of prosecutorial discretion within constitutional limits be an appropriate subject for judicial review. *United States* v. *Williams*, 431 F. 2d 1168, 1173 (C.A. 5), affirmed *en banc*, 447 F. 2d 1285 (C.A. 5), certiorari denied, 405 U.S. 954; *United States* v. *Pappas*, 445 F. 2d 1194 (C.A. 3), certiorari denied *sub nom. Miechlich* v. *United States*, 404 U.S. 984; *United States* v. *Hutul*, 416 F. 2d 606, 626–627 (C.A. 7), certiorari denied, 396 U.S. 1012.

The only case cited by petitioner dealing with the uniting of a perjury charge with a prior conspiracy charge is *United States* v. *Sweig*, 441 F. 2d 114 (C.A. 2), certiorari denied, 403 U.S. 932. In *Sweig* the court of appeals approved the joinder because of the "commonality of proof" relating to both offenses (441 F. 2d at 119). In the present situation, unlike *Sweig*, the evidence supporting the perjury charge was not the same as that which supported the fraud and conspiracy charges; joinder under Rule 8, Fed. R. Cr. P., would therefore not have been warranted. Furthermore, Rule 8 provides for permissible joinder of several offenses in a single indictment; it does not *require* the joinder of all offenses that could permissibly be joined.

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